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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Public Record

STB Ex Parte No. 582 (Sub-No. 1)



Advanced Notice of Proposed Rulemaking
MAJOR RAIL CONSOLIDATION PROCEDURES

AMERICAN PUBLIC TRANSPORTATION ASSOCIATION'S
COMMENTS

Overview

In response to the Surface Transportation Board's publication of the Advanced Notice of Proposed Rulemaking on modifications to its regulations at 49 CFR part 1180, subpart A (49 CFR 1180.0 – 1180.9) governing proposals for major rail consolidations, the American Public Transportation Association (APTA) is pleased to submit the following comments on procedures and regulations used by the Surface Transportation Board (STB) in reviewing and approving major railroad consolidations. Current merger regulations were adopted soon after passage of the Staggers Act of 1980, at a time when railroads were in critical need of a process that would allow them to take actions to rationalize what at that time was a significant degree of excess rail infrastructure. While these merger regulations were a proper and reasoned response to the serious problems affecting railroads and their customers at that time, it is now time to take a comprehensive review of the present and future structure of the North American rail industry. Accordingly, APTA applauds the Surface Transportation Board for its decision to review current merger regulations.

About APTA

APTA is a nonprofit international association of over 1,300 member organizations including transit systems; planning, design, construction and finance firms; product and service providers; academic institutions, and state associations and departments of transportation. APTA members, including commuter railroads and rail transit systems, serve the public interest by providing safe, efficient and economical public transportation services and products.

Summary of Comments

On February 28, 2000, APTA submitted comments on the general subject of major rail consolidations, and the present and future structure of the North American railroad industry. The comments were presented on behalf of the nation's public transportation industry, which in many instances uses the track or right-of-way of various freight railroads throughout North America. The following comments are a continuation of those ideas, and make the following recommendations as to how the Board's regulations should be changed--

- 1) STB should carefully consider the impacts of mergers on existing and future rail passenger services as a key factor in its determination on the merger itself. Any adverse impacts to rail passenger operations should be weighed, as a public policy issue, in the decision as to whether or not to approve any merger.
- 2) If there are any existing or future rail passenger operations that will be adversely affected by a merger, STB should consider ways to mitigate the impacts of that merger by granting additional access rights in that corridor, or by granting rights to prospective new services.
- 3) In its approval of railroad mergers, we urge the STB to maintain a strong oversight role to protect the interests of rail passengers.

Significance of STB Regulations to Rail Passenger Services

Historically, America's rail corridors have been used for both freight and passenger purposes. At one time, both were operated by the private sector under laws governing public utilities. These laws recognized the public interest in the system. As passenger operations became unprofitable, private railroads were relieved of the obligation to operate passenger service directly. Services were often taken over and supported financially by public entities.

Today, rail passenger service across America is in the midst of a renaissance. Over fifty new or extended rail systems have been added since the 1980's. The Transportation Equity Act for the 21st Century (TEA 21) itself provides funding for over 200 new rail projects.

Many of these projects and the communities they serve would benefit enormously through the use of existing freight corridors. Where capacity exists, using existing rights-of-way simply makes more sense and is more economical to the taxpayer than acquiring and bulldozing whole new corridors. When the use of a freight line is required, the rail passenger agency will typically seek to negotiate an agreement on a range of issues, including lease payments, schedules and dispatching, cost sharing of maintenance and capital investments, liability, and other matters.

In sharing these operating corridors, efficient and precise coordination of passenger and freight operations are absolutely essential in order to provide dependable service to customers. By and large, the commuting public will not give up their cars for a public transit option unless the service is absolutely dependable.

Experience has shown that mergers can and will disrupt operations in ways never contemplated by service contracts, and special action is merited in those circumstances. Consolidation of dispatching operations to more distant centralized dispatch centers is a common consequence in the merger context. In Chicago, the Regional Transportation Authority of Northeast Illinois (Metra) has incurred service disruptions with such consolidations, notwithstanding assurances from the merging carriers that transitions would go smoothly.

Mergers also trigger changes in management personnel. This can be problematic for commuter operations if supervisory transportation employees familiar with a particular commuter operation are to be replaced by people inexperienced in such operations. Personnel

changes are of particular concern where the freight carrier involved provides commuter services on behalf of the commuter authority through purchase of service agreements ("PSA's"). Particularly in the context where a PSA relationship exists, management transition plans of the merging freight carrier must ensure sufficient training and orientation of new managers before placing them in control of operations in a commuter district.

STB Rulings on Conrail and Union Pacific – Questions Remain

On July 23, 1998, STB approved, with conditions, the sale of Conrail to CSX and Norfolk Southern. Among other things, STB established a five-year oversight condition during which it will monitor events to assure there are no transaction-related impacts on "regional rail passenger operations" and on Amtrak. The STB decision regarding Conrail came in the aftermath of the Union Pacific - Southern Pacific merger (referred to collectively as UP), where rail passenger service was given low priority, resulting in widespread service problems. Similar problems have been encountered in the wake of the Conrail breakup as well.

As a condition of approving the Conrail sale, the STB required the railroads to report performance information to the Board. Unfortunately, that requirement did not, initially, include reporting on passenger operations impacts. When passenger reporting was subsequently required, it was limited to specific sections of the CSX and NS territories. It was not until significant service complaints surfaced that passenger impacts were considered relative to performance reporting, and even then the requirement did not extend to the full system.

While some may argue that there have been no impacts on passenger service as a result of the Conrail sale, a February 22, 2000, *Washington Post* article pointed out the negative impact on MARC's commuter operations. The article highlights the fact that on-time performance dropped from 90% or better prior to the sale (the actual number was 95%), to as low as 73% following the sale. A specific review of on-time performance for MARC's Camden and Brunswick lines, both of which are operated and dispatched by CSX, reveals that performance is still considerably worse than it was before June 1, 1999. Even VRE's commuter operations, which have received a higher level of attention from their host freight railroads, saw its on-time performance levels drop to 85% in June, 1999 and 90% in July, compared to 95% in April.

The 1997 UP merger is another example of the need for stronger protections under the Board's rules. The Los Angeles area was one of the areas hardest hit by the service disruptions following the merger, and commuter rail services provided through the Southern California Regional Rail Authority (SCRRA) suffered frequent and prolonged delays. Prior to the merger, SCRRA had received specific assurances both in the Operating Plan and in responses to discovery that the merger would provide no disruption whatsoever to Metrolink operations. Experience proved otherwise. SCRRA's experience demonstrates the need for enhanced regulatory protection to safeguard passengers from the chaos that often accompanies the merging parties' attempts to integrate two or more companies.

Past experience suggests a reduced level of attention on passenger operations following mergers as the rail freight carriers confront the myriad of merger-related freight operations issues that inevitably arise. Absent a meaningful oversight condition, this will again cause serious disruption to passenger rail service.

The Board needs to ensure that attention is given to system-wide impacts, and not just to the new territories affected by the merger. In the case of the Conrail acquisition, the passenger service problems were generally in the established portions of the system. Reporting requirements need to be established at the beginning of the process and need to be monitored on a continuing basis. Of particular concern to APTA members are instances when freight volumes projected prior to the merger - which are analyzed for their impact on passenger operations - are exceeded after the merger occurs.

Need for a Process to Facilitate Growth and to Consider Public Interest Questions

Unfortunately, a shortcoming exists in the current framework in which passenger rail projects using freight lines move forward. Specifically lacking is a process for helping resolve disagreements which may arise when parties cannot agree on terms and conditions for use of a railroad right-of-way. Currently, no such process or venue exists for consideration of public interest issues. Freight railroads can, and often do, unilaterally deny access to passenger rail agencies, sometimes for legitimate reasons, but often for dubious reasons or for no reason at all other than not wanting passenger rail operations. Public agencies so denied have no recourse under the existing framework. We are thus concerned that the proposed merger may make what is already a difficult process even more so.

The normal way a state or regional public transportation agency would gain access to property needed for public improvements would be through eminent domain proceedings. However, state law based condemnation authority does not extend to property owned by freight railroads, which come under the interstate authority of the federal STB.

APTA and the Association of American Railroads (AAR) have met to discuss the possibility of an industry-wide framework to help facilitate the negotiation of local agreements. While beneficial in framing issues that must be resolved in completing a negotiation for an operating agreement, the effort failed to produce any agreement on providing a recourse when the parties fails to reach an agreement.

Finally, in its review of major rail consolidations, STB should note that the ability of rail passenger agencies to obtain the rail access agreements they need to serve the public is a very difficult task under normal circumstances, but becomes even more complex in a continually downsizing core system.

Impacts on Rail Passenger Service Must be a Prime Consideration in Merger Determinations

The Board has raised the question as to whether now is the time to focus on opportunities to improve service, as opposed to continued consolidation. As these issues are considered, APTA urges the Board to fully consider the potential impacts of mergers on passenger operations, as well as on freight. We emphatically agree with recent STB statement that attention needs to be placed on how to improve service. We are equally emphatic that this focus on improved operations must extend to passenger as well as freight services. In some cases, this will require careful oversight on operating and dispatching matters.

STB's review and oversight must recognize the evolving rail passenger industry, and its critical inter-relationship with the rail freight industry. The STB policy statement is currently silent about the public interest in transportation services provided by passenger rail providers. This would suggest that the harms or benefits to be weighed in deciding whether to approve or to impose conditions on a transaction involve only impacts on the freight traffic affected by the transaction. Commuter operations should be viewed as "essential rail service" that should not suffer any deterioration in safety or reliability.

As mentioned in the opening part of our statement, APTA suggests the following three principles for STB to consider in its review of merger requests:

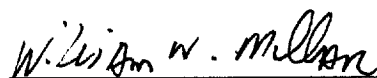
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- 3) In its approval of railroad mergers, we urge the STB to maintain a strong oversight role to protect the interests of rail passengers.

In addition, APTA suggests that applicants, before filing with the Board, be required to consult with local rail passenger authorities that operate trains on shared right of way or to review the preliminary operating plan being devised. The concept behind the pre-filing consultation is to permit the commuter authority to offer reactions or to offer resources to solve potential issues. Rail carriers typically devote considerable resources during this pre-filing period to line up shipper support for their transaction. A similar process to involve rail passenger interests would be an adjunct to that effort. Once completed, applicants can reflect their compliance with the requirement either by attaching a statement of support from the authority or a certificate documenting their consultation efforts.

APTA thanks STB for the opportunity to comment. We would be pleased to provide any additional information that may be useful to the Board.

Respectfully submitted by:

May 16, 2000



William W. Millar

President

American Public Transportation Association

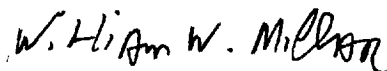
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16 day of May, 2000, he served a true and correct copy of the above and foregoing document on all parties of record on the Service list (Appendix A of the notice To Parties in this proceeding served April 28, 2000, May 10, 2000 and May 12, 2000.) in accordance with the Surface Transportation Board's Rules of Practice by:

☒ United States mail, first class postage prepaid

☐ Facsimile transmission

☐ Hand delivery



William W. Millar

President

American Public Transportation Association